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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Nygard Inc.

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Serial No. 75/687,474

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Henry Klein and Kevin Steinman of Ladas & Parry for Nygard Inc.

Michael W. Baird, Trademark Examining Attorney, Law Office 109 (Ronald R. Sussman, Managing Attorney).

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Before Seeherman, Hanak and Hohein, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Nygard Inc. has appealed from the final refusal of the Trademark Examining Attorney to register ALLISON & CO., with "& CO." disclaimed, as a trademark for "women's clothing, namely jackets, skirts, blouses, pants, leggings, shorts, pant suits, shirts, camp shirts, coats, sweaters, pull-overs, cardigans, tunics, housecoats, jumpers, jump

suits, gilets, jeans, t-shirts, t-tops, vests, tank tops, knit tops, culottes and suits."[1] Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark ALLYSON SAN FRANCISCO, with "SAN FRANCISCO" disclaimed, and registered for "clothing, namely, dresses, skirts, blouses, skorts, shorts, shirts, pants, jackets, sweaters, vests and jumpsuits,[2] that, if used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney have filed briefs and supplemental appeal briefs.[3] An oral hearing was not requested.

Our determination is based on an analysis of all of the probative facts in evidence that are relevant to the

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[1] Application Serial No. 75.687,474, filed April 20, 1999, based on an asserted bona fide intention to use the mark in commerce.

[2] Registration No. 2,208,148, issued December 8, 1998.

[3] After applicant and the Examining Attorney filed their original briefs, applicant requested remand in order to properly make of record certain third-party registrations it had untimely submitted with its appeal brief, and to which the Examining Attorney had objected. Applicant also requested remand to make of record two of its own registrations. Because the Examining Attorney consented to the remand, it was granted, and after the Examining Attorney considered the additional evidence and maintained the refusal, applicant was given the opportunity to file a supplemental appeal brief. The supplemental brief applicant filed is simply a copy of its original brief. Applicant is advised that if it did not wish to submit a supplemental brief, it should have so advised the Board, rather than cluttering the file with an additional paper that is merely a copy of the previously filed brief.

factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

In this case, applicant's goods are in part identical and otherwise closely related to the goods identified in the cited registration. Thus, the goods must be deemed to travel in the same channels of trade, and to be sold to the same classes of consumers, which would include the public at large. Applicant's arguments that the goods travel in different channels of trade because its goods are sold in upscale department stores or are sold to sophisticated purchasers are to no avail.[4] There are no restrictions on the channels of trade in either applicant's application or the registrant's registration, and therefore the goods must be deemed to travel in all channels of trade appropriate for such clothing, including discount stores. **In re Davis-Cleaver Produce Company**, 197 USPQ 248 (TTAB 1977). Similarly, because the identified clothing may include

[4] Although applicant states in its brief that the exclusive distributor of its goods is the Dillard's Department Store chain, the application is based on intent to use, and there is no evidence in the file that applicant is actually using the mark.

inexpensive and frequently replaced items which may be purchased "off the rack" or taken from a display without sales help and without deliberation, and because clothing is purchased by virtually everyone, the consumers of applicant's and the registrant's clothing must be deemed to include uneducated and impulse buyers, and not exclusively the sophisticated purchasers posited by applicant.

We turn next to a consideration of the marks, bearing in mind that when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. **Century 21 Real Estate Corp. v. Century Life of America**, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In comparing marks, it is a well-established principle that there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. **In re National Data Corp**., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Here, ALLISON is the dominant element of applicant's mark, the disclaimed words "& CO." (that is, AND COMPANY), having little source-indicating value. Similarly, ALLYSON is the dominant element of the cited mark, since the disclaimed words SAN

FRANCISCO are geographically descriptive. When the marks are compared as a whole, they convey a similar commercial impression, and consumers are likely to view the differences between the marks, in terms of the additional words, as indicating variant marks for clothing coming from a single source, rather than as indicating the trademarks of two different companies. Nor is the minor difference in the spelling of ALLISON and ALLYSON sufficient to distinguish the marks. Whether spelled as ALLISON or ALLYSON, the word has the same pronunciation and connotation of a name. Although there is a minor visual difference, because it is buried within the name, it is not likely to be noted or remembered by consumers.

Applicant asserts that because the term ALLISON has been registered by various third parties, ALLYSON SAN FRANCISCO is a weak mark which is not entitled to a broad scope of protection. The third-party registrations which applicant has submitted in support of this position are all for marks in which ALLISON appears as part of what appears to be an individual's name, for example, ALLISON WOODS, ALLISON PAIGE, ALLISON BRITTNEY and ALLISON SMITH. The additional name appearing in the marks serve to distinguish them from each other, and from ALLYSON SAN FRANCISCO; however, the descriptive term "& CO." in applicant's mark

does not have the same function. Thus, even if we accept that the cited mark ALLYSON SAN FRANCISCO is not entitled to a broad scope of protection, and cannot prevent the registration of other ALLISON marks which contain some additional distinguishing element, applicant's mark does not contain such an element. Simply put, the company designation "& CO." in applicant's mark does not serve to distinguish it from ALLYSON SAN FRANCISCO in the same way that the third-party registrations for the ALLISON name marks do.

Applicant also argues that it has a family of ALLISON marks. To begin with, applicant's other registrations are not for ALLISON per se, but are all for ALLISON DALEY (e.g., ALLISON DALEY STRETCH TECH; ALLISON DALEY NO-IRON COTTON). These registrations, even if applicant could show that its marks had been promoted as a family, would not demonstrate a family with the surname ALLISON. More importantly, an applicant cannot rely on a family of marks in order to register a mark which is likely to cause confusion with a previously registered mark. See **Baroid Drilling Fluids Inc. v. Sun Drilling Products**, 24 USPQ2d 1048 (TTAB 1992).

In conclusion, because the marks are similar, the goods are in part identical and otherwise closely related,

the channels of trade and classes of consumers are the same, and the goods are purchased, at least in part, by unsophisticated consumers who may act on impulse, we find that confusion is likely.

Decision: The refusal of registration is affirmed.